Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1997

BHARESH D. DEDHIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals had jurisdiction to reverse the district court's granting of a new trial on counts one through four considering the fact that the United States failed to designate this part of the court's order in its notice of appeal and the fact that the United States specifically disclaimed any intention to appeal the granting of a new trial in its brief.

II. Whether the Court of Appeals erred reversing the district court's granting of a new trial on counts one through four because it failed to use an abuse of discretion standard.

III. Whether the Court of Appeals erred reversing the district court's granting of an arrest of judgment on counts five and six because those counts failed to allege a material statement.

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The opinion of the District Court is unreported and is reprinted in Appendix B.

JURISDICTION

The opinion of the Court of Appeals in this case was filed on January 22, 1998. This petition is therefore timely under this Court's Rule 13.1.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES OF COURT INVOLVED

This case involves application of the following constitutional provisions and rules of court.

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .
>
> Fifth Amendment

In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury . . .

Sixth Amendment

A notice of appeal . . . must designate the judgment, order, or part thereof appealed from . . .

F.R.A.P. 3(c).

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.

Fed.R.Crim.P. 33.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Fed.R.Crim.P. 52(b).

STATEMENT OF THE CASE

Bharesh Dedhia, a native of India, came to the United States on a non-immigrant visitor's visa in January 1990, after finishing medical school in India. (A-3[1]). He stayed with his sister in the Chicago area. (E-2).

Dedhia applied to and interviewed with a number of

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[1] References are to Appendices pages of this Petition for Writ of Certiorari.

hospitals across the country seeking acceptance into a surgical residency program. (A-3, E-3). On April 3, 1990, Dedhia entered into an agreement with Mt. Sinai Hospital to begin a surgical residency. (E-3). As a surgical resident, Dedhia was entitled to a J-1 or H-1 visa. (E-3). He did not apply for such a status, however, because it was made unnecessary by the following facts.

Throughout this period and pursuant to Hindu tradition, a marriage between Dedhia and Rupal Patel, a naturalized United States citizen from India, was being arranged by both families at the initiation of Dedhia's sister. (A-3). This culminated in the arranged marriage of Dedhia to Rupal Patal on May 31, 1990. (A-3). Based on this marriage, Dedhia changed his status to conditional permanent resident. This entitled him to a conditional alien registration card. (A-3). About a month later, Dedhia moved to Cleveland to begin his surgical residency while Rupal remained in Chicago to complete her undergraduate studies at Loyola.[2] (A-3).

On June 15, 1992, Dedhia filed an I-751 petition to remove the conditions on his residency, basing his request on his marriage to Rupal. (A-4). Dedhia was granted a permanent alien registration card. (A-4). Several months

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[2] While this estrangement may seem unusual by American standards, the Hindu religion forbids the consummation of a marriage, even after a civil ceremony, until a Hindu religious ceremony is performed. Their long distance marriage was necessitated by Petitioner's obligations as a surgical resident as well as Rupal's subsequent decision to pursue a post-graduate degree in Chicago.

later, the couple broke up. (A-5). Rupal initiated a divorce and a dissolution of marriage was negotiated. (A-5). In January 1993, the marriage was invalidated on the grounds of fraud. (A-5). The Judgment of Invalidity, signed by Dedhia while under duress and having no other choice under the circumstances,[3] stated he purposefully and intentionally misrepresented to Rupal that he would marry her in order to obtain an Alien Registration card for the purpose of remaining in the United States and to obtain a contract for residency in a hospital in Cleveland. (A-5).

Subsequently, Rupal filed a complaint with the Immigration and Naturalization Service ("INS"). (A-5). At an interview with the INS, Dedhia produced a health insurance form, dated July 16, 1991, purporting to enroll Rupal in Dedhia's health insurance. (A-5). He also produced a residential lease renewal, dated June 1993, which appeared to have Rupal's signature. (A-5).

On August 6, 1994, Dedhia was indicted on six counts related to marriage fraud. (A-6). Count one charged Dedhia entered marriage with the purpose of evading immigration laws. (A-6). Count two charged Dedhia knowingly presented false material statements as true on

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[3] When Petitioner's marriage broke up, an annulment was necessary because Hindu religious custom virtually eliminates the possibility of remarriage for a divorced woman. Under Illinois law, the only grounds available to annul Petitioner's marriage were fraud and impotence. Petitioner was precluded from asserting impotence as grounds for annulment because this would per se admit an attempt to consummate his marriage in violation of Hindu religious tenants.

the I-751 form which bore a forged signature of Rupal and falsely certified that the marriage was not entered into to obtain immigration benefits. (A-6). Count three charged that Dedhia knowingly obtained and accepted an alien registration card procured by a false claim and fraud. (A-6). Count four charged that Dedhia knowingly possessed and used an alien registration card procured by a false claim and fraud. (A-7). Counts five and six charged perjury based on the insurance form and the lease renewal, respectively. (A-7).

Dedhia was convicted on all counts by a jury. (A-7). After the verdict, Dedhia moved for an acquittal, arrest of judgment, and new trial. (A-7). The trial court granted a new trial on counts one through four and arrested judgment on counts five and six. (A-7).

The United States filed a timely notice of appeal appealing "from the final judgment entered in this action on June 18, 1996, pursuant to 18 U.S.C. § 3731." (C-1). The United States' appellate brief specifically addressed only two issues: (1) whether "the district court incorrectly arrested judgment," and (2) whether the district court made an incorrect evidentiary ruling that might affect the retrial of count two. (D-2). Additionally, the brief states "the United States is not raising a separate argument challenging the district court's exercise of discretion in granting a new trial on Counts 1 through 4." (D-3). The United States did suggest, however, that the Court of Appeals remand for reconsideration of the order granting a new trial if it prevailed on appeal because that order was based in part on the district court's determination that

allowing counts five and six to go to the jury was error. (D-3).

Dedhia's appellate brief responds to the issues raised by the United States and does not address the basis of the district court's order for new trial. (E-2, 3 & 4). Dedhia did, however, note that such an order is reversible only for an abuse of discretion and that the United States is jurisdictionally barred from questioning the order. (E-4).

The Court of Appeals reversed the district court and reinstated the jury verdicts on all counts. (A-18). As to counts five and six, it held the insurance and lease forms could be material as a matter of law. (A-9 through A-15). As to counts one through four, it applied a plain error analysis and held Dedhia failed to meet his burden under this standard. (A-15 through A-18).

Dedhia timely files this Petition for Writ of Certiorari with this honorable Court.

REASONS FOR GRANTING THE WRIT

The district court arrested judgment on two counts and granted a motion for new trial on the remaining counts because it determined the two counts failed, as a matter of law, to charge material conduct and that the jury instructions had deprive Petitioner of due process because they were contrary to this Court's recent pronouncement that materiality in perjury cases is a matter for the jury to determine, *United States v. Gaudin*, 515 U.S. 506 (1995).

The United States appealed only the part of the order relating to arrest of judgment. Despite this fact, the Court of Appeals reversed the district court's entire order and reinstated the jury verdicts. The Court should grant a writ of certiorari for the following reasons.

First, this Court's recent decisions concerning the application of F.R.A.P. 3(c) to appellate jurisdiction where the notice of appeal fails to clearly specify the parties has confused the Sixth Circuit as to how to apply the Rule's requirement that a notice of appeal designate the "judgment, order, **or part thereof** appealed from." Because this Court has not addressed this specific requirement of the Rule, there is conflict in appellate application. This confusion resulted in the instant reversal of the new trial order without any jurisdiction to do so. This Court should exercise its supervisory power to correct this departure from the accepted and usual procedure.

Second, the Court of Appeals analytical method for reversing the district court's new trial order was based upon this Court's recent decision of *Johnson v. United States*, 117 S.Ct. 1544, 137 L. Ed. 2d 718 (1997)(applying plain error standard to defendant's appeal of improper jury instruction not raised below). Even if the Court of Appeals had jurisdiction to reach this issue, factually *Johnson* is inapplicable because this would be an appeal by the government of the granting of a new trial, not by the defendant of the denial of one. Because this Court's decision in *Gaudin* reversed the law in "every Court of Appeals that has considered the issue, except for the Ninth

Circuit,"[4] including the Sixth Circuit, this Court must settle the important federal question of how to apply *Gaudin* to existing cases. *Johnson* should have done so, but the Court of Appeals misapplied it to divergent facts. This Court should correct this misapplication of its recent precedent.

Third, the matters raised herein are of great public interest and will have a substantial impact upon the countless immigrants residing within the United States.

ARGUMENT

I. THE COURT OF APPEALS WAS WITHOUT JURISDICTION TO REVERSE THE DISTRICT COURT'S GRANTING OF A NEW TRIAL ON COUNTS ONE THROUGH FOUR BECAUSE THE UNITED STATES FAILED TO DESIGNATE THIS PART OF THE COURT'S ORDER IN ITS NOTICE OF APPEAL AND SPECIFICALLY DISCLAIMED ANY INTENTION TO APPEAL THE GRANTING OF A NEW TRIAL IN ITS BRIEF.

Dedhia was convicted by a jury on all counts. Post trial, however, the district court entered an order for new trial on counts one through four. The same order also arrested judgment on counts five and six. The United States' notice of appeal and appellate brief clearly state

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[4] *Gaudin*, 515 U.S. at 527.

that they were appealing only the arresting of judgment on counts five and six. Therefore, the Court of Appeals had no jurisdiction to reverse the district court's granting of new trial as to counts one through four.

Federal Rule of Appellate Procedure 3(c) requires that the notice of appeal "shall designate the judgment, order or part thereof appealed from." F.R.A.P. 3(c); *Smith v. Barry*, 502 U.S. 244, 247-48 (1992). The United States filed a notice of appeal stating it was appealing "from the final judgment entered in this action on June 18, 1996, pursuant to 18 U.S.C. § 3731." Section 3731 allows the United States to appeal, *inter alia*, both the "dismissing of an indictment" and the "granting of a new trial." 18 U.S.C. § 3731. The granting of a new trial, however, is not a final judgment. *United States v. Sam Goody, Inc.*, 675 F.2d 17, 20-21 (2nd Cir. 1982)(citing cases); *United States v. Draper*, 746 F.2d 662, 664 (10th Cir. 1984)(citing cases); *United States v. Taylor*, 544 F.2d 347, 349 (8th Cir. 1976)("It is well established law . . . that an order granting a new trial is not a final judgment."). Since the United States specifically stated it was appealing from the final judgment, it is clear it sought review of only the arresting of judgment as to counts five and six, a final order.

Dedhia's view is confirmed by the United States' subsequent conduct. The United States' brief confined appellate argument to two issues: (1) whether "the district court incorrectly arrested judgment," and (2) whether the district court made an incorrect evidentiary ruling that might affect the retrial of Count Two. Furthermore, the brief specifically states "the United States is not raising a

separate argument challenging the district court's exercise of discretion in granting a new trial on Counts 1 through 4." There is no doubt that the United States appealed only from the part of the district court's order arresting judgment as to counts five and six.

This Court has held that "although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988). The United States' "failure to clear [this] jurisdictional hurdle can never be 'harmless' or waived by a court." *Id.*

This Court has confirmed that the principle of liberal construction does not excuse noncompliance; "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." *Smith v. Barry*, 502 U.S. 244, 248 (1992). "Noncompliance," in other words, "is fatal to an appeal." *Id.*

Because the United States did not appeal from that part of the district court's order granting a new trial, the Court of Appeals was jurisdictionally barred from reversing that decision. The part of the decision doing so must be vacated.

Subsequent to briefing, the United States filed two letters of citation of supplemental authorities informing the Court of Appeals that it desired to rely on *Johnson v.*

United States, 117 S.Ct. 1544 (1997), *United States v. Olano*, 507 U.S. 725 (1993), and *United States v. Frost*, 125 F.2d 346 (6th Cir. 1997), at oral argument. These cases allegedly pertained to arguments raised in their brief; they do not. Dedhia filed notice that he intended to distinguish these cases which are "not on point with the instant case." (F-1). The fact that these cases are inapplicable to the issues raised on appeal was noted by Petitioner during oral argument.

These cases have nothing to do with the issues raised by the United States as discussed above. They discuss the application of the plain error rule on appeal by a defendant challenging convictions based upon improper, unchallenged jury instruction on materiality. The Court of Appeals reliance on these cases was error (see Argument II below).

Regardless of the application of these decisions herein, the United States' letters could not and did not extend the jurisdiction of the Court of Appeals to review the district court's grant of a new trial. In *Torres*, 487 U.S. at 314, this Court held that permitting courts to exercise jurisdiction over a party not named in the notice of appeal after the time for filing a notice of appeal had passed is equivalent to permitting courts to extend the time for filing a notice of appeal. "Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former." *Id.* For the same reason, the Court of Appeals was powerless to assume jurisdiction over a part of the district court's order not appealed from within the time limit for filing the notice of appeal; i.e, the granting

of a new trial.

After *Torres*, the Court of Appeals had to sit *en banc* to determine how to apply the case to facts similar to *Torres* (whether the use of "*et al*" was sufficient to designate the parties to an appeal under F.R.A.P. 3(c)). *Minority Employees v. Tennessee*, 901 F.2d 1327 (6th Cir. 1990). While the basis for disagreement is not pertinent here, it is important to note that the Court of Appeals was closely split on how to apply this Court's precedent to similar facts. When the Court of Appeals subsequently had a case before it in which the notice of appeal failed to designate the judgment, order, or part thereof appealed from, its was unable to determine, considering this Court's precedents and *Minority Employees*, whether or not it had jurisdiction. *Brooks v. Toyotomi Co.*, 86 F.3d 582 (6th Cir. 1996)(jurisdiction assumed arguendo but not decided).

In *Brooks*, the appellant filed a notice of appeal subsequent to a denial of her motion for new trial that did not specify what order she was appealing from. The Courts of Appeals considers a notice of appeal from a denial of new trial to reach the adverse judgment also; therefore, under that set of facts, there was only one part of the order that could possibly have been appealed from.[5] Noting that the Fifth Circuit would "undoubtedly" find jurisdiction, and if it were not for *Minority Employees* they would be "strongly inclined so to hold," the Court of Appeals said it was "not inconceivable" to them that this

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[5] Unlike the instant case.

Court's precedents would negate jurisdiction. *Brooks*, 86 F.3d at 583, 586-587.

This Court should resolve this confusion in the application of its precedents concerning F.R.A.P. 3(c).

While prejudice to Dedhia is not required to prevail, he notes that he was severely prejudiced. Dedhia's appellate brief properly responds only to those issues raised by the United States and, therefore, does not address the basis of the district court's order for new trial. *United States v. Cardenas*, 748 F.2d 1015, 1023 (5th Cir. 1984)(appellee "is allowed only to respond to the government's arguments"); *United States v. Williams*, 679 F.2d 504, 507 (5th Cir. 1982)(appellee's attempt to raise issues on appeal not responsive to appellant's brief "would have been dismissed for want of jurisdiction").

If the United States had appealed the district court's granting of a new trial, Petitioner could have briefed, and the Sixth Circuit and this Court would be aware of, the full underlying record supporting the district court's decision. Denial of the opportunity to brief this issue on appeal is clearly prejudice.[6]

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[6] Especially where the district court judge hearing Dedhia's defense at trial thought the evidence was close. So close, indeed, that she determined her error in instructing as to materiality constituted a miscarriage of justice.

II. THE COURT OF APPEALS ERRED REVERSING THE DISTRICT COURT'S GRANTING OF A NEW TRIAL ON COUNTS ONE THROUGH FOUR BECAUSE IT FAILED TO USE AN ABUSE OF DISCRETION STANDARD.

As to counts one through four, the Court of Appeals reversed the district court's order for new trial and reinstated the jury verdicts applying a plain error analysis. The Court of Appeals' decision is infirm because abuse of discretion is the proper standard of review.

The district court held, as a matter of law, that the element of materiality in counts five and six could not be proven; therefore, those counts should not have gone to the jury. Its order a for new trial was two-fold. First, materiality was an element of counts two, five, and six. Pursuant to the law of the circuit at the time, the court instructed the jury that the charged statements were material as a matter of law. Subsequently, this Court held that materiality was an issue for jury determination in *United States v. Gaudin*, 515 U.S. 506 (1995) pursuant to a criminal defendant's constitutional right to demand a jury find him guilty of all the elements of the crime with which he is charged. The district court found that because its failure to submit the issue of materiality to the jury on count two "cast doubt upon the fundamental fairness associated with count two," it could not conclude that the error was harmless beyond a reasonable doubt. Applying *Chapman v. California*, 386 U.S. 18, 24 (1967)(holding the court must be able to declare a belief that constitutional error was "harmless beyond all reasonable doubt" to find

it harmless), the court granted Dedhia's motion for a new trial as to count two. It did not grant a new trial as to counts five and six because it had earlier arrested judgment on those counts.

Second, the district court concluded that the erroneous instruction on count two, coupled with the erroneous inclusion of counts five and six, tainted the jury's decision-making with regard to counts one, three, and four and warranted a new trial on those counts: "Because the counts are so closely intertwined and clearly interrelated, the Court is not convinced beyond a reasonable doubt that the jury could not have relied on these errors to convict Dedhia of counts one, three and four."

Relying on *Johnson*, *Olano*, and *Frost* (the cases cited in the United States' notices of supplemental authorities), the Court of Appeals applied a plain error analysis to vacate the district court's order of a new trial and to reinstate the jury verdicts as to counts one through four. While the Court of Appeals properly quotes these cases, they are wholly inapplicable here.

Johnson and *Frost* are cited merely for the proposition that "where a defendant has failed to object, before *Gaudin*, to the district court's refusal to submit the issue of materiality to the jury, plain error review under Federal Rule of Criminal Procedure 52(b) applies." *Olano* is cited merely as setting forth the four prong test applicable to reversing errors not raised at trial under Fed.R.Crim.P. 52(b). Applying this standard, the Court of Appeal held that Dedhia would not be able to meet the fourth prong of

the plain error test.

If the district court had not granted a new trial and Dedhia was on direct appeal of his conviction, these precedents would be relevant; but he is not.

In any event, ignoring a lack of jurisdiction for a moment, the Sixth Circuit *sua sponte* converted this case to an appeal by the United States of the granting of a new trial. The law is clear that the Court of Appeals must review the district court's grant of a motion for new trial under an abuse of discretion standard. *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988). The district court held that its failure to submit the issue of materiality to the jury cast doubts upon the fundamental fairness of the trial as to count two so that it could not conclude the error was harmless. The same conclusion is inherent in the court's decision as to counts five and six because the court ruled that it had erred in not submitting the issue of materiality to the jury on these counts but held that Dedhia's motions for new trial were mooted by the arresting of judgment. The district court further concluded that the close intertwining of the remaining counts precluded the court from finding that the jury could not have relied on the error to convict. It also concluded that the jury quite possibly could have considered viability of the marriage itself as determinative rather than how such viability, or lack thereof, reflected upon Dedhia's subjective state of mind at the time of the marriage.

The discretion conferred on the district court under Federal Rule of Criminal Procedure 33 is broad and

permits the trial judge to balance the importance of any perceived errors against the proceedings as a whole in evaluating the overall fairness of the trial. *Unites States v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988); *Bruner v. Dunaway*, 684 F.2d 422, 425 (6th Cir. 1983). Rule 33 provides that "the court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." Fed.R.Crim.P. 33. Matters that a district could may consider under Rule 33 include perceived errors or confusions resulting from the jury instructions. *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 617-18 (5th Cir. 1991)(quorum); 2 Charles A. Wright, *Federal Practice and Procedure* § 556, at 306, 311 (1982).

This narrow standard of review corresponds to the rationale underlying Rule 33: That "the trial judge, not an appellate court reading a cold record, can best weigh the errors against the record as a whole to determine whether those errors in the conduct of the trial justify a new trial." *McBride*, 862 F.2d at 1320; cf. *Arizona v. Washington*, 434 U.S. 497, 514 (1978)(holding that the reviewing court must grant broad deference to the district court's decision to grant mistrial, on the ground that a trial judge "is far more conversant with the factors relevant to the determination[] than any reviewing court can possibly be"). The trial judge is thus vested with authority to "take into account the knowledge [s]he gained from presiding at the trial, knowledge that the appellate court will not have." Wright, supra, § 559, at 369 (footnote omitted).

Deference to the trial judge's knowledge of the facts and impressions of the witnesses is even more needful

here. This is so because the Court of Appeals was not appraised of the relevant facts, nor the application of those facts, to the order granting a new trial.

Because the Court of Appeals applied the wrong standard of review to arrive at its decision, and because the issue was not briefed on appeal, this Court should vacate the decision. Reversal is especially appropriate considering that under *Chapman v. California*, 386 U.S. 18, 24 (1967), the district court must be able to declare a belief that her error was "harmless beyond a reasonable doubt" before she could enter judgment. The district court's order cogently discusses why she could not do so. Therefore, it is inconceivable that her determination, under such a rigid standard, could be determined an abuse of discretion by the Court of Appeals on the face of a cold appellate record.

III. THE COURT OF APPEALS ERRED REVERSING THE DISTRICT COURT'S GRANTING OF AN ARREST OF JUDGMENT ON COUNTS FIVE AND SIX BECAUSE THOSE COUNTS FAILED TO ALLEGE A MATERIAL STATEMENT.

The district court held that the insurance and lease renewal forms submitted to the INS investigators by Dedhia could not be material because they were submitted by Dedhia only to show that a viable marriage existed rather than the material question of whether the marriage was valid at its inception. The district court was very specific when it said:

> the representations Dedhia allegedly made to the INS concerned only the viability of his marriage to Patel and not its validity at inception.

(B-4).

The United States argued on appeal, and the Court of Appeals seems to have accepted, a misinterpretation of the district court's order; to wit, that the documents in the general category of those complained of in counts five and six cannot ever be material. This misinterpretation is directly refuted by the district court's opinion itself. The district court specifically stated that it:

> acknowledges that the parties' conduct after marriage can be relevant to the determination of marriage fraud under 8 U.S.C. § 1325(b). Such conduct, however, is relevant only to the extent it bears upon their subjective state of minds at the time they were married.

(B-13). Indeed, the district court instructed the jury that "the conduct of the parties after marriage is relevant as to their intent at the time of the marriage." *Id.*

The Court of Appeals' reversal states that documents of a similar nature to those alleged in the indictment relating to the viability of a marriage are circumstantial evidence of the validity of the marriage at its inception and therefore material. This analysis begs the question; allegations of an indictment do not exist in a vacuum. The indictment must allege a material false statement, knowingly made. It is

not whether a category of forms **can be** material that is determinative; but rather, whether the forms charged in the indictment were material.

Contrary to the Court of Appeals' assumption that "the false statements were specifically offered by the defendant to rebut the charge . . . that the marriage was not bone fide at its inception" (A-13), the record clearly revealed and the district court specifically found that Dedhia supplied the statements to the INS only as to the issue of marriage **viability**. There being no evidence that Dedhia statements were supplied to prove marriage **validity**, the district court correctly held that the indictment failed to charge perjury, as a matter of law, and should not have gone to the jury.

Additionally, it is undisputed that a statement is material only if it has the natural tendency to influence the decision making body to which it was addressed. *Gaudin*, 515 U.S. at 509. Here, the INS was investigating whether a marriage that was dissolved in January 1993 was valid at its inception in May 1990. Count six charged that a false residential lease renewal dated June 1993 was material to this inquiry. Such a proposition is incredible as a matter of law. A lease renewal dated six months after the marriage was annulled could not influence the decision of the investigators, much less have a natural tendency to do so.

This Court should vacate the Court of Appeals reversal as to counts five and six.

CONCLUSION

Confusion arising from this Court's various opinions applying F.R.A.P. 3(c), and the lack of a decision specifically on point with the instant facts, has resulted in the reversal of an order for new trial without jurisdiction to do so.

Additionally, the Court of Appeals has applied this Court's recent decisions relating to materiality in perjury prosecutions to facts divergent from those cases, and never specifically addressed by this Court, to apply a standard of review contrary to that generally applicable under the facts and this Court's precedents.

For these compelling reasons, this Court should grant Dedhia's petition and issue a writ of certiorari to review and reverse the decision of the Sixth Circuit and remand for retrial on counts one through four.

Respectfully submitted,

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April 13, 1998.

APPENDIX A

United States of America, Plaintiff-Appellant
v.
Bharesh D. Dedhia, Defendant-Appellee

No. 96-3788

1998 U.S. App. Lexis 854; 134 F.3d 802
1998 FED App. 0026P

October 27, 1997, Argued

January 22, 1998, Decided

January 22, 1998, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 94-00281. Ann Aldrich, District Judge.

DISPOSITION: Judgment REVERSED the district court and REINSTATED the jury verdict on all counts of the indictment. The case is REMANDED to the district court for sentencing.

COUNSEL: ARGUED: Phillip J. Tripi, OFFICE OF THE U.S. ATTORNEY, Cleveland, Ohio, for Appellant.

ARGUED: Gretchen A. Holderman, LILLIE, PH.D. & ASSOCIATES, Cleveland, Ohio, for Appellee.

ON BRIEF: Phillip J. Tripi, OFFICE OF THE U.S.

ATTORNEY, Cleveland, Ohio, for Appellant.

ON BRIEF: Gretchen A. Holderman, Richard G. Lillie, LILLIE, PH.D. & ASSOCIATES, Cleveland, Ohio, for Appellee.

JUDGES: Before: CONTIE, DAUGHTREY, and COLE, Circuit Judges.

OPINIONBY: MARTHA CRAIG DAUGHTREY

OPINION: MARTHA CRAIG DAUGHTREY, Circuit Judge.

The defendant, Bharesh D. Dedhia, was convicted by a jury of six counts of immigration-related fraud and making false statements. After trial, the district court granted the defendant's motion to arrest judgment on the two false-statement charges in counts five and six of the indictment, citing insufficiency of the indictment, and ordered a new trial on the first four counts, based on an error that resulted when the issue of materiality was not submitted to the jury as required by *United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995).* The government appeals, seeking reversal of the order vacating two counts of the conviction and a remand for reconsideration of the order granting a new trial on the other four counts. After careful study, and particularly in light of our recent decision in *United States v. Frost, 125 F.3d 346 (6th Cir. 1997),* we are convinced that all six convictions should be reinstated and the case remanded for sentencing.

PROCEDURAL AND FACTUAL BACKGROUND

Bharesh Dedhia, a native of India, came to the United States on a non-immigrant visitor's visa in January 1990, after finishing medical school in India. Despite the fact that the visa was for six months only and restricted Dedhia from working while in the United States, once here he began applying for surgical residency programs.

On May 31, 1990, Dedhia married Rupal Patel, a naturalized United States citizen from India, in a civil ceremony in Illinois. The marriage had been arranged by both families at the initiation of Dedhia's sister, after the couple had spent only a few hours together. Because of Hindu tradition, the civil ceremony was considered merely an engagement, and the couple would not consider themselves to be married until a religious ceremony was performed. Despite repeated attempts by the "bride" and her family to schedule a Hindu wedding ceremony, it never took place. Nevertheless, after the civil ceremony, Dedhia changed his status to conditional permanent resident, based on his marriage to a United States citizen. Conditional residence entitled Dedhia to a conditional alien registration card ("green card").

A month or so after the civil ceremony, Dedhia moved to Cleveland to begin a surgical residency program, leaving Patel behind in Chicago. As time went on, she noticed that he began to distance himself from her, postponing any discussion of the Hindu ceremony and urging her to "be patient." Both parties agree that the marriage was never consummated and that the couple

never lived together, other than during brief visits.

The conditional resident status of the kind Dedhia had is valid for two years. Before the two years end, a conditional resident must file a I-751 petition to remove the conditions on his or her residence. The petition is usually based on marriage to a United States citizen or permanent resident, and can be filed jointly by the married couple. The petitioner may, however, request a waiver of the joint filing requirement for several reasons: if the conditional resident spouse has been battered, if the United States citizen spouse is deceased, or if the conditional resident "entered into the marriage in good faith, but the marriage was terminated through divorce/annulment." If the Immigration and Naturalization Service approves the petition, it removes the conditions on a resident's status, and grants him or her permanent resident status. If a I-751 petition is not filed, the conditional resident status expires automatically at the end of the two year period.

On June 15, 1992, two months before his conditional status was set to expire, Dedhia filed an I-751 petition to remove the conditions on his residency, basing his request on his May 1990 marriage to Patel. The petition was purportedly filed jointly with Patel, and contained a signature that appeared to be hers. Also on the petition, Dedhia signed a section of the form affirming that "if the conditional residence was based on a marriage, I further certify that the marriage was entered into in accordance with the laws of the place where the marriage took place, and was not for the purpose of procuring an immigration benefit." As a result of the petition, Dedhia was granted a

permanent alien registration card.

Several months after the removal of the conditions on his status, Dedhia initiated a breakup with Patel. Patel then commenced divorce proceedings, and a dissolution of the marriage was negotiated. In January 1993, seven months after the I-751 petition was filed, the marriage was invalidated on the grounds of fraud. The Judgment of Invalidity, which Dedhia signed, found that

> [T]he Respondent, Bharesh Dedhia, purposely and intentionally misrepresented to the petitioner that he would marry her in a civil marriage ceremony as well as under the Hindu religion and that he was interested in her for a life-long relationship as husband and wife in order to obtain his Alien Registration card for the purpose of remaining in the United States and to obtain a contract for his residency in a hospital in Cleveland.

After the marriage was annulled, Patel filed a complaint with the Immigration and Naturalization Service, which began investigating Dedhia for marriage fraud. As part of the investigation, the Immigration and Naturalization Service interviewed Dedhia in February 1994. At the interview, Dedhia provided the Immigration and Naturalization Service agent with two documents to support his contention that his marriage to Patel had been bona fide. One document was a health insurance application, dated July 16, 1991, purporting to enroll Patel on Dedhia's health insurance. The second was a residential lease renewal dated June 1993, which appeared to have

Patel's signature.

At trial, Patel testified that she did not sign either the I-751 petition or the lease renewal agreement. She also testified that she had no contact with the defendant after the marriage was dissolved in January 1993 and thus could not have signed the lease renewal five months later. The government introduced testimony from a handwriting expert that Patel's signature on the I-751 form was a forgery. In addition, the government put forth testimony by the Chief Financial Officer of the health insurance company that the enrollment form was fraudulent for several reasons: it was never filed with the company for coverage, the form itself did not exist at the time it was purported to have been executed, it contained an incorrect coverage starting date, it contained inaccuracies in the billing clerk's name and number, and it lacked a date stamp.

Dedhia was indicted on six counts of marriage and related immigration fraud. Count one charged that the defendant entered marriage with the purpose of evading immigration laws, in violation of *8 U.S.C. § 1325*(c). Count two charged that the defendant knowingly presented as true a false statement with respect to a material fact in an application to the Immigration and Naturalization Service, in violation of *18 U.S.C. § 1546*(a). This charge was based on the allegation that Dedhia filed the I-751 form with Patel's signature forged and falsely certified that the marriage was not entered into to obtain immigration benefits. Count three charged that the defendant knowingly obtained and accepted an alien registration card, knowing

it to have been procured by means of a false claim and fraud, in violation of *18 U.S.C. § 1546*(a). Count four charged that the defendant knowingly possessed and used alien registration receipt cards to obtain employment as a surgical resident and to reenter the United States on two occasions, in violation of *18 U.S.C. § 1546*(a). Counts five and six, based on the allegedly fraudulent insurance application form and lease renewal, charged that the defendant knowingly and intentionally made false statements in support of his claim that his marriage was not entered into with the purpose of circumventing the law of the United States, in violation of *18 U.S.C. § 1001.*

Dedhia was found guilty on all counts. After the verdict, he moved for an acquittal, arrest of judgment, and new trial. The district court issued an opinion denying the motion for acquittal but granting a new trial on counts one through four and arresting judgment on counts five and six.

The court arrested judgment on counts five and six because it concluded that the conduct charged was insufficient to constitute a violation of *18 U.S.C. § 1001.* Interpreting a Sixth Circuit case, *United States v. Qaisi, 779 F.2d 346 (6th Cir. 1985),* the court concluded that the narrow issue before the court was the validity of the marriage at its inception, not the continuing viability of the marriage. The court held that the fraudulent evidence in counts five and six, the fictitious health insurance application and the forged lease renewal, purported only to show that Dedhia and Patel were still living in a viable marriage, and thus was not material to the underlying marriage fraud charge. Hence, as a matter of law, the court

held, the element of materiality could not be proved, and counts five and six never should have gone to the jury.

In granting a new trial on the four remaining counts, the district court found that the recent Supreme Court decision in Gaudin had overturned a line of precedent on which the court had based its jury instructions. In Gaudin, an *18 U.S.C. § 1001* prosecution as well, the Court held that when materiality is an element in a charged offense, a trial judge's refusal to submit that issue to the jury infringes on the defendant's Sixth Amendment right to a jury trial. *515 U.S. at 522-23.* In the present case, following the precedent of this court up until Gaudin, the district court had charged that the issue of materiality was a matter of law for the court, rather than the jury, and instructed the jury that the statements alleged were material.

Because the Supreme Court decided Gaudin while the present case was pending, Gaudin applies retroactively. *Griffith v. Kentucky, 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987).* The district court concluded that the failure to submit the materiality issue in counts two, five, and six to the jury "abridged Dedhia's right to have a jury determine his guilt as to every element of the crimes with which he was charged," and thus constituted error. The district court further found that because failure to submit the issue of materiality to the jury on count two "cast doubt upon the fundamental fairness associated with count two," the court could not conclude that the error was harmless beyond a reasonable doubt. The court therefore granted a new trial as to count two. Although counts five

and six also contained a materiality element that the court did not submit to the jury, the court did not discuss the effect of that error because it had earlier arrested judgment on those counts on separate grounds.

Finally, the court concluded that the erroneous materiality charge on count two, coupled with the erroneous inclusion of counts five and six, tainted the jury's decision-making with regard to the remaining counts (one, three, and four) and warranted a new trial on counts one through four: "Because the counts are so closely intertwined and clearly interrelated, the Court is not convinced beyond a reasonable doubt that the jury could not have relied upon these errors to convict Dedhia of counts one, three and four." The district court thus ordered a new trial on counts one through four.

I. MATERIALITY

The United States initially contests the order dismissing counts five and six of the indictment. A court may arrest judgment if "the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Fed.R.Crim.P. 34. Whether an indictment adequately alleges the elements of the offense is a question of law subject to de novo review. *United States v. Superior Growers Supply, Inc., 982 F.2d 173 (6th Cir. 1992).*

Counts five and six of the indictment charged that Dedhia violated *18 U.S.C. § 1001* when he presented a fictitious health insurance application and a forged lease

renewal agreement to the Immigration and Naturalization Service to support his claim that his marriage to Patel was not entered into to evade immigration laws. The statute prohibits "knowingly and willfully ... making or using any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." *18 U.S.C. § 1001*(a)(3). One of the elements that the government must prove under § 1001 is the materiality of the false statement. *Gaudin, 515 U.S. at 509.* A statement is material if it has a natural tendency to influence a decision or function within the jurisdiction of a governmental agency. Id.

In arresting judgment on counts five and six, the district court stated that "in order to convict Dedhia pursuant to § 1001, the government had to establish that Dedhia knowingly made false representations to the INS and the representations were material to the underlying fraud charge." The marriage fraud was charged count one under *8 U.S.C. § 1325*(c), which makes it a crime for "any individual [to] knowingly enter into a marriage for the purpose of evading any provision of the immigration laws." In essence, the underlying crime charged was entering into a fraudulent marriage, not being in a fraudulent marriage. The court ruled that the false statements in the documents were not material to the issue of whether Dedhia had entered into the marriage fraudulently, and thus, as a matter of law, the conduct charged in counts five and six was insufficient to constitute a violation of *18 U.S.C. § 1001.*

In the ruling, the district court relied on this court's

decision in Qaisi, a perjury case in an immigration fraud context with similar facts. In Qaisi, two brothers who had convinced one of their wives not to seek a divorce and to testify falsely at an immigration hearing that the couple was still living together, so that the husband could obtain permanent residence status, were tried and convicted under *18 U.S.C. § 1001*. This court reversed the convictions because the statements regarding the current living arrangements, while false, were not material. *779 F.2d at 347-48*. We noted that under *8 U.S.C. § 1255*, a "pretextual" marriage to a United States citizen cannot support the grant of immigration benefits. *Id. at 348*. In overturning the conviction, we distinguished between false statements about the validity of a marriage at its inception, which would be material to an inquiry into whether the marriage was pretextual, and false statements about the current viability of a marriage, such as the testimony that the couple was still living together, which are not material to the question of whether the marriage was entered into to obtain immigration benefits. We explained: "The only issue upon which Abdul's application for citizenship turned was whether his marriage . . . was pretextual . . . . The viability of a marriage is not a material factor in deciding to confer or deny an immigration benefit." Id. (emphasis added). We ultimately held that "although the statements made at the October 29 hearing were false they were not material to the issue at hand." Id.

Analogizing to Quasi, the district court in the present case made a similar finding:

Because the viability of Dedhia's marriage to Patel

> was not at issue, and because the representations Dedhia allegedly made to the INS concerned only the viability of his marriage to Patel and not its validity at inception ... this Court erred when it concluded that the representations were material.

Although the documents at issue could be found to be fraudulent (and indeed the jury must have found them to be false in order to convict on these counts), the district court concluded, they were not material to the issue at hand -- whether the marriage was bona fide when it was entered into.

With due respect for the district court's analysis, we conclude that Qaisi is easily distinguished from the case at hand. In Qaisi, this court noted that:

> The indictment charged the defendants with making false statements about the current viability of the marriage and premised materiality on viability. At the pretrial hearing the district court and the United States Attorney acknowledged that the indictment did not charge a sham marriage, and the district court confirmed that the immigration examiner had inquired into the viability of the marriage when the issue he should have been pursuing was the sham marriage. Finally, at the pretrial hearing, the United States Attorney acknowledged the marriage was valid at its inception.

779 F.2d at 348. Here, in contrast, the defendant was charged with entering into a sham marriage, and the

government was specifically investigating charges that the marriage had been pretextual. The government does not merely premise materiality on the viability of the marriage, as it mistakenly did in Qaisi, but rather argues that the false representations about the continuing viability of the marriage were submitted to show that the marriage was not a sham. Indeed, the false statements were specifically offered by the defendant to rebut the charge, filed by Patel and supported by the marriage annulment, that the marriage was not bona fide at its inception. The perjury in Qaisi, in contrast, was offered by the brothers to rebut the charge that the marriage was not currently viable.

Moreover, subsequent to our opinion in Qaisi, Congress enacted the Immigration Marriage Fraud Amendments, Pub. L. No. 99-639 (1986), codified at *8 U.S.C. § 1186a*. This law instituted a two-year conditional period before permanent residency based on marriage is granted and requires that those filing for permanent residency status through the normal I-751 process be married at the end of that two-year period. *8 U.S.C. § 1186a*(b)(1). In addition, the regulations allow evidence of the current viability of the marriage to be considered when reviewing an immigrant's petition for permanent residency:

> (5) Documentation. Form I-751 shall be accompanied by evidence that the marriage was not entered into for the purpose of evading the immigration laws of the United States. Such evidence may include:
>
> (i) Documentation showing joint ownership

> of property;
>
> (ii) Lease showing joint tenancy of a common residence;
>
> (iii) Documentation showing commingling of financial resources;
>
> (iv) Birth certificates of children born to the marriage;
>
> (v) Affidavits of third parties having knowledge of the bona fides of the marital relationship, or
>
> (vi) Other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.

8 C.F.R. § 216.4(a)(5) (emphasis added). These regulations thus allow for consideration of a couple's actions during a marriage in determining whether that marriage was fraudulent at its inception.

In this case, the new regulations are instructive, but not dispositive. Dedhia did not offer the false documents when he filed his I-751, but rather offered the documents when he was later investigated by the Immigration and Naturalization Service. As in Qaisi, the counts in questions five and six allege violations of *18 U.S.C. § 1001,* not marriage fraud. Nevertheless, because the INS considers

evidence of the current viability of a marriage in determining whether it was fraudulent at its inception, the documents in question are material as circumstantial evidence of the initial fraud. Although Dedhia did not offer the documents during the I-751 review process, the fact that the INS expects applicants to supplement their permanent residency application with these types of evidence helps establish the materiality of the documents in counts five and six. Dedhia specifically offered the documents to influence the investigation into whether his marriage had been a sham, and a jury could clearly find that those false statements were material to the underlying charge of sham marriage. Thus, the district court erred in ruling that as a matter of law counts five and six did not charge an offense because the false documents could not be material.

II. JURY INSTRUCTIONS

The intervening Supreme Court decision in Gaudin requires us not only to determine whether there was error in the jury charge, but also whether the error requires reversal. See, e.g., *United States v. Tandon, 111 F.3d 482, 488 (6th Cir. 1997)* (discussing the effect of the Gaudin decision on the many cases pending in circuits in which it was well established, at the time of the trial, that materiality was a question of law). The Supreme Court has recently held in *Johnson v. United States, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997),* that where a defendant has failed to object, before Gaudin, to the district court's refusal to submit the issue of materiality to the jury, plain error review under Federal Rule of Criminal Procedure

52(b) applies. See also *United States v. Rogers, 118 F.3d 466 (6th Cir. 1997)* (applying plain error in light of Johnson). Plain error applies to the failure to object at trial even though, at the time of trial, the law was well-settled and such an objection would have been futile. *Johnson, 117 S. Ct. at 1548* ("The seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure"); *Rogers, 118 F.3d at 471.*

There are four prongs to the plain error analysis under Rule 52(b). *United States v. Olano, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993).* Before this court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. *507 U.S. at 732;* Fed.R.Crim.P. 52(b). If those three factors are met, then this court may exercise its discretion to notice a forfeited error (4) if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *507 U.S. at 732.*

The first prong is clearly met in this case because the failure to submit materiality to the jury is error under Gaudin, and under Griffith, a new rule for the conduct of criminal prosecutions is applied retroactively to all cases pending on direct review. *Johnson, 117 S. Ct. at 1549.* The second prong, that the error is plain, is also met. Plain is synonymous with "clear" or "obvious." *Olano, 507 U.S. at 734.* In Johnson the Supreme Court held that "in a case such as this -- where the law at the time of the trial was settled and clearly contrary to the law at the time of appeal -- it is enough that an error be 'plain' at the time of

appellate consideration," and found that a Gaudin error was plain. *117 S. Ct. at 1549.*

Assessing the remaining two prongs is more difficult. An error "affecting the defendant's substantial rights" has been described by the Olano court as "error . . . [that has] affected the outcome of the district court proceedings." *507 U.S. at 734.* Even if the defendant in this case could establish the existence of such a prejudicial error, he would still be required to show that the error was so prejudicial that it "seriously affected the fairness, integrity, or public reputation of judicial proceedings." Id. Because the evidence of materiality is overwhelming in this case, we conclude that the third and fourth prongs simply cannot be met.

We are led to this conclusion by the recent Frost decision, in which this court found no plain error in the failure to submit the materiality element to the jury on a count of making a false declaration to the grand jury (a violation of *18 U.S.C. § 1623). 125 F.3d at 387.* In Frost, we followed the plain error analysis set forth in United States v. Johnson, as the other post-Johnson panels in this circuit have done in reviewing Gaudin errors, and found no plain error because materiality had not been controverted and the evidence of materiality was overwhelming. *125 F.3d at 386-87.*

The Frost court held that "although a false statement must have the capacity to influence a decision, it does not have to be actually influential in order to be material." *125 F.3d at 387.* Under this standard, then, we need not even

find that the false documents influenced the INS investigators, but only that the documents could have influenced them. Given that the INS regularly considers such evidence in reviewing permanent residency applications, these documents clearly had a capacity to influence their investigation into whether Dedhia's marriage was a sham.

In view of the rulings in Johnson and Frost, we conclude that the error committed by the district court in failing to submit the question of materiality to the jury was not reversible error and that the grant of a new trial was therefore unnecessary.

CONCLUSION

For the reasons set out above, we REVERSE the judgment of the district court and REINSTATE the jury verdict on all counts of the indictment. The case is REMANDED to the district court for sentencing.

APPENDIX B

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 1:94CR0281
v.	)	MEMORANDUM
BHARESH D. DEDHIA,	)	AND
Defendant.	)	ORDER

ALDRICH, J.

On August 16, 1994, the Federal Grand Jury for the Northern District of Ohio indicted Dr. Bharesh D. Dedhia for marriage fraud and related immigration fraud counts. The six-count indictment charged that Dedhia, a native and citizen of India, entered into a civil marriage to evade a provision of the immigration laws, possessed and used fraudulently obtained immigration documents and knowingly made false statements to the Immigration and Naturalization Service ("INS"). On March 29, 1995, a jury returned guilty verdicts as to all six counts of the indictment. For the reasons stated below, the Court grant's Dedhia's motion for arrest of judgment as to counts five and six, denies Dedhia's motion for acquittal and arrest of

judgment as to counts one through four and grants Dedhia's motion for a new trial as to counts one though four.

I. Introduction

On June 19, 1995, prior to this Court's ruling on Dedhia's motions, the United States Supreme Court in United States v. Gaudin, 115 S.Ct. 2310 (1995), overturned a line of precedent upon which this Court based its jury instructions. Shortly thereafter, based on the decision in Gaudin, the Court granted Dedhia leave to supplement his motion for an acquittal, new trial and arrest of judgment.

II. Dedhia's Motion for Arrest of Judgment and Acquittal

A. Motion for Arrest of Judgment

Dedhia claims, pursuant to Federal Rule of Criminal Procedure 34, that he is entitled to an order in arrest of judgment. The court shall arrest judgment if "the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Fed.R.Crim.P. 34. Moreover, Rule 34 requires a court to refuse to enter judgment after verdict when it appears from the record that the judgment would be in error or would be reversible.

Although it is apparent from the face of the indictment that counts one through four of the indictment charge Dedhia with conduct which constitutes an offense under

the laws of the United States, counts five and six do not. Counts five and six of the indictment charge that Dedhia violated 18 U.S.C. § 1001 when he used a fictitious health insurance application and lease renewal agreement with the forged signature of his wife, Rupal Patel, to support his claim that his marriage to her was not entered to avoid a provision of the immigration laws. In order to establish a violation of § 1001, it was incumbent upon the government to convince the jury beyond a reasonable doubt that Dedhia: (1) made a representation to the INS; (2) the representation was false; (3) the representation was material; (4) Dedhia knowingly and willfully made the false statement; and (5) the representation was made in a matter within the jurisdiction of the INS.

As a matter of law, the conduct charged in counts five and six is insufficient to constitute a violation of § 1001. Although as discussed below, this Court erred when it failed to submit the issue of materiality as to counts five and six to the jury, this Court erred more fundamentally when it failed to recognize that at law the conduct charged could not be material. Pursuant to count one of the indictment, Dedhia was charged with marriage fraud. In order to convict Dedhia of marriage fraud, the government had to establish that Dedhia entered the marriage for the purpose of evading a provision of the immigration laws. In order to convict Dedhia pursuant to § 1001, the government had to establish that Dedhia knowingly made false representations to the INS and the representations were material to the underlying marriage fraud.

The conduct charged in the indictment as to counts five

and six could not be material as to whether Dedhia entered the marriage with Rupal Patel for the purpose of evading a provision of the immigration laws. In United States v. Qaisi, 779 F.2d 346 (6th Cir. 1985), the Sixth Circuit Court of Appeals held the validity of a marriage is not a material factor for the purpose of awarding an immigration benefit. The Court vacated the conviction pursuant to § 1001 because the indictment was insufficient in that it charged that the defendant had made false statements about the viability of the marriage. The Court concluded that the viability of a marriage is not a material factor in deciding to confer or deny immigration benefits. Id. at 348. Accordingly, in this case, because the viability of Dedhia's marriage to Patel was not at issue, and because the representations Dedhia allegedly made to the INS concerned only the viability of his marriage to Patel and not its validity at inception, this Court erred when it failed to recognize that the indictment was insufficient and erred when it concluded that the representations were material. The Court, therefore, grants Dedhia's motion to arrest judgment pursuant to Rule 34 as to counts five and six and denies Dedhia's motion as to counts one through four.

B. Motion for Acquittal

Rule 29 of the Federal Rules of Criminal Procedure dictates that a court shall enter judgment of acquittal if "the evidence is insufficient to sustain a conviction." Fed.R.Crim.P. 29. A motion for judgment of acquittal should be granted only where the evidence is such that a reasonably minded jury must have a reasonable doubt as to the existence of one of the essential of the crime charged.

Burks v. United States, 437 U.S. 1, 16 (1978). The court may neither weigh the evidence, nor assess the credibility of witnesses. Id. Under Rule 29, "if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' the convictions must be affirmed." United States v. Hughes, 895 F.2d 1135, 1140 (6th Cir. 1990)(quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Furthermore, the Court is "bound to make all reasonable inferences and credibility choices in support of the jury's verdict." Hughes, 895 F.2d at 1140 (citing United States v. Stull, 743 F.2d 439, 442 (6th Cir. 1984), cert. denied, 470 U.S. 1062 (1985)).

It is apparent form the record that there was sufficient evidence to support Dedhia's conviction as to counts one through four as charged in the indictment. As to count one, the United States offered a petition for the dissolution of marriage filed in Cook County, Illinois, in which Dedhia jointly represented to an Illinois court that his marriage to Rupal Patel had been entered for the purpose of obtaining an immigration benefit. The United States also submitted evidence that Dedhia had used immigration documents obtained pursuant to allege marriage fraud. Furthermore, a review of the record demonstrates that the United States proffered evidence sufficient to defeat Dedhia's Rule 29 motion for acquittal.

III. Dedhia's Motion for New Trial

Rule 33 of the Federal Rules of Criminal Procedure authorizes this Court to grant a new trial "if required in the interest of justice." Fed.R.Crim.P. 33. The decision to

grant or deny a motion for a new trial rests within the sound discretion of the district court. United States v. Seago, 930 F.2d 482, 488 (6th Cir. 1991). Under Rule 33, a district court may consider perceived errors or confusion resulting from jury instructions, and may grant a new trial to cure improper instructions. United States v. Guthrie, 814 F.Supp. 942, 947 (E.D. Wash. 1993)(citing Charles Wright, 3 Federal Practice and Procedure: Criminal § 556 (1982)), aff'd, 17 F.3d 397 (9th Cir. 1994), cert. denied, 115 S.Ct 87. The defendant bears the burden of proving the need for a new trial and such motions should be granted sparingly and with caution. Seago, 930 F.2d at 488.

Prior to the decision in Gaudin, it was widely accepted that the issue of materiality was a question of law to be decided by the court. See e.g., United States v. Keefer, 799 F.2d 1115, 1126 (6th Cir. 1986). Moreover, the Sixth Circuit routinely stated that even when the statute did not expressly include materiality as an element of the offense, it was appropriate for a court both to impose and to decide a materiality requirement, as a matter of law, in order to ensure the reasonable application of the statute. See id.; see also United States v. Chandler, 752 F.2d 1148, 1151 (6th Cir. 1985); United States v. Abadi, 706 F.2d 178, 180 n.2 (6th Cir.), cert. denied, 464 U.S. 821 (1983). This Court based its instruction, as agreed to by the parties, upon these assumptions.

Nevertheless, the Supreme Court in Gaudin made it clear that when materiality is an element in a charged offense, a trial judge's refusal to allow the jury to pass on

that issue infringes the defendant's Sixth Amendment right to jury trial. Gaudin, 115 S.Ct. at 2320. In that case, the government charged Gaudin with violating 18 U.S.C. § 1001 by making false statements on HUD loan documents. In instructing the jury, the district court charged that the issue of materiality is a matter of law for the court, rather than the jury, to decide, and that the statements in question were in fact material. The jury convicted Gaudin, but the Ninth Circuit reversed, holding that taking the question of materiality from the jury violated the Fifth and Sixth Amendments. The Supreme Court affirmed reasoning that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality." Id. at 2314. Because the Supreme Court decided Gaudin while this case was still pending, Gaudin applies retroactively to this case. See e.g., Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987)("a new rule for the conduct of criminal prosecution is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"); United States v. Stack, 853 F.2d 436, 437 (6th Cir. 1988)(same). Thus, the Court reviews the record in light of Gaudin to determine the effect of the materiality charge.

The six-count indictment charged that Dedhia: (1) from May 31, 1990, to January 20, 1993, knowingly entered a marriage with Rupal Patel, a naturalized United States citizen from India, for the purpose of evading a provision of the immigration laws as prohibited by 8 U.S.C. § 1325(b); (2) violated 18 U.S.C. § 1546(a) when he

submitted a false Form I-751 petition to the Immigration and Naturalization Service ("INS") for the purpose of procuring permanent resident alien status; (3) violated 18 U.S.C. § 1546(a) when he received an alien registration receipt card which he knowingly procured through fraud; (4) violated 18 U.S.C. § 1546(a) when he used the card to obtain and maintain employment; and (5) and (6) violated 18 U.S.C. § 1001 when he used a fictitious health insurance application and lease renewal agreement with the forged signature of Ms. Patel to support his claim that his marriage to her was not entered to avoid a provision of the immigration laws.

By agreement of the parties, this Court determined that counts two, five and six would include materiality as an element of the charged offense to be proved by the United States. Accordingly, the Court issued a general instruction to the jury that:

> [t]he materiality of any of the allegedly false statements referred to in these instructions is not a matter with which you are concerned, but rather is a question for the court to decide. You are instructed that the statements alleged in the indictment would each constitute a material statement.

Jury Instr., p. 37.

It is obvious from the face of the instruction that this Court's failure to allow the jury to decide the issue of materiality as to counts two, five and six abridged

Dedhia's right to have a jury determine his guilt as to every element of the crimes with which he was charged. See Gaudin, 115 S.Ct at 2320; see also United States v. Krosky, 418 F.2d 65, 66 (6th Cir. 1969). Having already disposed of counts five and six, this Court examines the effect of the instruction on count two of the indictment, and concludes that such instruction constituted error. Therefore, the Court must determine whether, on the record as a whole, the error associated with count two was "harmless beyond reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967)(holding that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was "harmless beyond a reasonable doubt."); United States v. Robinson, 887 F.2d 651, 655 (6th Cir. 1989)(applying Chapman harmless error test to unconstitutional jury instruction).

Alleging that Dedhia violated 18 U.S.C. § 1546(a),[1] count two of the indictment charged:

> On or about June 9, 1992, Defendant, Bharesh Dedhia, did knowingly subscribe and present as

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[1] Section 1546(a) provides in relevant part:
Whoever knowingly makes under oath, or . . . knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement . . . [s]hall be fined under this title or imprisoned not more than 10 years, or both. (emphasis added).

> true a false statement with respect to material [sic] fact in an application, affidavit and other document required by the Immigration Laws and regulations prescribed thereunder, to wit: Bharesh D. Dedhia prepared and caused to be delivered to the INS a form I-751, Petition to Remove Conditions on Residence, knowing said document contained the forge signature of "Rupal Dedhia" and knowing he falsely certified his marriage was not entered into for the purpose procuring [sic] an Immigration benefit.

(emphasis added). A review of the record indicates that the proffered evidence concerning the forgery of Rupal Dedhia's signature lacked any probative value. Thus, the central concern with regard to count two was whether Dedhia falsely certified that his marriage was not entered into for the purpose of procuring an immigration benefit. The materiality of any evidence associated with this issue was improperly taken away from the jury, and decided by this Court. Accordingly, because the error cast doubt upon the fundamental fairness associated with count two, the Court cannot conclude that the error was harmless beyond a reasonable doubt. "The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments." Ross v. Clark, 478 U.S. 570, 579 (1986). In the interest of justice, Dedhia's motion for a new trial is granted as to

counts two.[2]

The Court is also required to determine whether the erroneous materiality charge, coupled with the erroneous inclusion of counts five and six, tainted the jury's decision-making with regard to counts one, three and four so as to warrant a new trial on all counts. Because the counts are so closely intertwined and clearly interrelated, the Court is not convinced beyond a reasonable doubt that the jury could not have relied upon these errors to convict Dedhia of counts one, three and four.

As to count three, the court charged that if the jury determined that

> Dedhia was not guilty of both Count 1 and Count 2, then you must also determine that he is not guilty of this count. If you determined that Dr. Dedhia was guilty of either Count 1 or Count 2, or both, then you must independently determine whether he is guilty of this count.

Jury Instr., p. 25-6. Similarly, as to count four, the Courts charged that if the jury determined that Dedhia was not guilty of both counts one and two then it could not convict Dedhia of court four. Additionally, the Court instructed the jury that if it determined that Dedhia did not obtain the

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[2] Because this Court has determined that counts five and six were flawed, as a matter of law, Dedhia's motion for a new trial as to these counts is moot. See supra part II.A.

alien registration receipt card by fraud as alleged in count three then it must also determine that Dedhia was not guilty of using the alien registration receipt card under count four.

The Court's determination not to include materiality as an element in counts three and four was premised on the necessary conclusion that the allegations of the indictment and the evidence proffered by the United States could not support a conviction for counts three and four unless the jury determined both that Dedhia was guilty of either count one or two, and guilty of the independent elements of the crimes charged in counts three and four. Obviously, the Court does not know which count(s) the jury relied upon in convicting Dedhia of both counts three and four. It is settled law that where a verdict may be constitutionally supportable on one ground, but not another, and a court cannot determine upon which ground the verdict rested, the court should set aside the verdict. Adeste v. United States, 354 U.S. 298 (1957); United States v. Wilkenson, 26 F.3d 623, 625 (6th Cir. 1994)("Where a jury instruction is given in the alternative, and any one of the alternative instructions is in error, the verdict must be assumed to have 'rested exclusively on the insufficient ground.'")(quoting Zant v. Stephens, 462 U.S. 862, 881, 103 S.Ct 2733, 2745 (1983)); United States v. Stack, 853 F.2d 436, 439 (6th Cir. 1988)(defendant granted new trial where jury was referred in instructions to improper instructions as to other count in the indictment). Therefore, to void a miscarriage of justice, this Court grants Dedhia's motion for a new trial as to counts three and four.

The Court is even more convinced that a new trial with respect to count one is warranted. Count one of the indictment charged Dedhia with the general offense of marriage fraud.[3] Here, the Court instructed the jury:

> In order to determine whether a marriage is fraudulent and entered for the purpose of evading the immigration laws, the conduct of the parties after the marriage is relevant as to their intent at the time of the marriage; evidence to establish intent may take many forms, including, but not limited to, proof that the beneficiary is listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences.

Jury Instr., p. 20. This Court acknowledges that the parties' conduct after marriage can be relevant to the determination of marriage fraud under 8 U.S.C. § 1325(b). Such conduct, however, is relevant only to the extent it bears upon their subjective state of mind at the time they were married. Lutwak v. United States, 344 U.S. 604, 617 (1953). Even though the above-quoted instruction was not

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[3] Again, the indictment alleged a violation of 8 U.S.C. § 1325(b) which provides:

(b) Marriage fraud

Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.

erroneous with regard to this rule of law, the Court concludes that a clear possibility of jury confusion may have occurred as a result of the jury instructions pertaining to counts five and six. As noted previously, viability of a marriage is irrelevant for determining whether the parties intended a sham marriage. See supra part II.A. It is quite possible that the jury considered the viability of Dedhia's marriage in resolving count one, which is obviously irrelevant for the purposes of the parties' subjective state of mind at the inception of marriage. Consequently, and in spite of the Court's instruction to the jury that "[e]ach charge and the evidence pertaining to it, should be considered separately," Jury Instr., p. 15, there is a pervasive risk that the jury relied on the charge and admitted evidence concerning count five and six to convict Dedhia of count one. Moreover, although each of the charged offenses constituted independent crimes, they were all closely connected to the basic question as to whether Dedhia attempted to defraud the INS and to gain an immigration benefit.[4]

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[4] The nature of the charges against Dedhia required the jury to consider evidence offered as to multiple counts of the indictment. For example, the United States offered evidence that Dedhia presented an allegedly fraudulent immigration document to prove the underlying marriage fraud charged in count one, but also to prove the crime of presentation of a fraudulent immigration document charged in count two, to support a determination that he obtained an immigration document knowingly procured be fraud charged in count 3, and to support the conclusion that Dedhia then used that document as charged in count 4. The United States also presented evidence that Dedhia made false statements to the INS both to support a conviction

(continued...)

Because the Court is convinced that these errors misled the jury as to count one and denied Dedhia his right to due process, this Court determines that in the interest of justice Dedhia is entitled to a new trial as to count one. See United States v. Robinson, 887 F.2d 651, 655 (6th Cir. 1989)(where court erred as to one count, and other counts were closely intertwined, risk that jury might have seized on admission warranted reversal of conviction).

IV. Conclusion

For the reasons stated above, this Court grant's Dedhia's motion for new trial as to counts one through four, and strikes counts five and six of the indictment. This Court also denies Dedhia's motion for acquittal as to counts one through four.

IT IS SO ORDERED.

/s/
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

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[4] (...continued)
as to counts five and six, and to support a determination that Dedhia committed marriage fraud as charged in count 1.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 1:94CR0281
Plaintiff,	)	JUDGE ANN ALDRICH
v.	)	
BHARESH DAMJI DEDHIA,	)	GOVERNMENT'S
Defendant.	)	NOTICE OF APPEAL

Notice is hereby given that the Plaintiff, United States of America, in the above-captioned case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on June 18, 1996, pursuant to 18 U.S.C. § 3731.

Respectfully submitted,

EMILY M. SWEENEY
United States Attorney

By: /s/
PHILLIP J. TRIPI
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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 96-3788

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
BHARESH D. DEDHIA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio
Eastern Division

Case No. 1:94CR281

FINAL BRIEF OF PLAINTIFF-APPELLANT UNITED STATES OF AMERICA

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Counsel for Defendant-Appellee

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Counsel for
Plaintiff-Appellant

. . .

ISSUES PRESENTED

I. WHETHER THE DISTRICT COURT INCORRECTLY ARRESTED JUDGMENT ON TWO FALSE STATEMENT COUNTS ON THE GROUND THAT, AS A MATTER OF LAW, THE DEFENDANT'S MISREPRESENTATIONS TO THE INS WERE NOT MATERIAL.

II. WHETHER THE DISTRICT COURT'S STATEMENT, THAT THE DEFENDANT HAD FORGED HIS WIFE'S SIGNATURE ON AN INS FORM "LACKED ANY PROBATIVE VALUE" AS PROOF ON AN IMMIGRATION FRAUD COUNT, IS AN INCORRECT RULING EXCLUDING EVIDENCE AT THE DEFENDANT'S NEW TRIAL.

. . .

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY ARRESTED JUDGMENT ON TWO FALSE STATEMENT COUNTS ON THE GROUND THAT, AS A MATTER OF LAW, THE DEFENDANT'S MISREPRESENTATIONS TO THE INS WERE NOT MATERIAL

. . .

F. The Case should be Remanded for a New Determination on the Motion for New Trial

Although the United States is not raising a separate argument challenging the district court's exercise of discretion in granting a new trial on Counts 1 through 4, that decision was largely based on the district court's belief that it had inappropriately allowed the jury to consider counts 5 and 6 (see Argument I, subsection C, supra) and its mischaracterization of the evidence relating to count 2 (see Argument II, infra). As such, a reversal of the decision to arrest judgment on Counts 5 and 6 and/or reversal of the court's evidentiary ruling regarding the forged I-751 petition would warrant a remand of the entire matter to the district court to reconsider its earlier decision to order a new trial on the remaining counts.

. . .

CONCLUSION

For the foregoing reasons and authorities, and based upon the entire record, the order vacating the two counts of conviction pursuant to 18 U.S.C. § 1001 should be reversed and this case remanded for reconsideration of the decision to grant a new trial.

Respectfully submitted,

EMILY M. SWEENEY
UNITED STATES ATTORNEY

APPENDIX E

NO. 96-3788

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
-vs-
BHARESH D. DEDHIA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Ohio
Eastern Division

FINAL BRIEF OF APPELLEE

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. . .

ISSUES PRESENTED

THE GOVERNMENT'S APPELLATE BRIEF PROPOSES TO RAISE THE FOLLOWING ISSUES ON APPEAL:

I. "WHETHER THE DISTRICT COURT INCORRECTLY ARRESTED JUDGMENT ON TWO FALSE STATEMENT COUNTS ON THE GROUND THAT, AS A MATTER OF LAW, THE DEFENDANT'S MISREPRESENTATIONS TO THE INS WERE NOT MATERIAL."

II. "WHETHER THE DISTRICT COURT'S STATEMENT, THAT THE DEFENDANT HAD FORGED HIS WIFE'S SIGNATURE ON AN INS FORM "LACKED ANY PROBATIVE VALUE" AS PROOF ON AN IMMIGRATION FRAUD COUNT, IS AN INCORRECT RULING EXCLUDING EVIDENCE AT THE DEFENDANT'S NEW TRIAL."

. . .

STATEMENT OF THE FACTS

The Defendant-Appellee herein, Bharesh Dedhia, came to the United States in January, 1990 after just finished [sic] medical school in his native country in India. He came to Illinois on a visitor's Visa where he stayed with his sister and brother-in-law who lived in the Chicago area.

Having completed medical school and desiring to be accepted into a surgical residency program, Bharesh applied to and interviewed with a number of Hospitals in the country, including hospitals in the Detroit and Cleveland areas. Bharesh expected to be accepted into one of these surgical residency programs to complete his medical studies and become a surgeon. As a surgical resident, Bharesh would be eligible for a J-1 or an H-1 Visa.

. . .

Bharesh entered into an agreement with Mt. Sinai Hospital on April 3, 1990, to begin his surgical residency.

. . .

ARGUMENT

. . .

I. THE DISTRICT COURT CORRECTLY ARRESTED JUDGMENT ON COUNTS 5 AND 6 OF THE INDICTMENT

. . .

II. THE DISTRICT COURT'S STATEMENT THAT FORGERY OF RUPAL DEDHIA'S SIGNATURE LACKED ANY PROBATIVE VALUE IS CORRECT

. . .

Finally, as noted supra., the Government has improperly and without justification attacked the trial court's granting of a new trial in the case sub judice.

The United State Supreme Court has recognized and held that the burden of justifying a new trial rests with the defendant. U.S. v. Geders, 625 F.2d 31, 33 (5th Cir. 1980). The decision, however, to grant a new trial falls within the sound discretion of the trial court and will be reversed only for an abuse of discretion. Additionally, the government cannot appeal the granting of a new trial pursuant to 28 U.S.C. Section 1291; nor may it properly seek mandamus to require a district court to vacate its new trial order and reinstate the guilty verdict. [citations omitted, emphasis in original].

Defendant-Appellee submits that the Government cannot question the District Court's Order granting a New Trial as to Counts 1, 2, 3, and 4 of the Indictment against Defendant-Appellee herein.

. . .

Respectfully submitted,

/s/

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APPENDIX F

LAW OFFICES
LILLIE, PH.D. & HOLDERMAN
ATTORNEYS AT LAW

October 20, 1997

Leonard Green
[Clerk, Sixth Circuit]

Re: Citation of Supplemental Authorities
United States v. Bharesh D. Dedhia
Case Number 96-3788

Dear Mr. Green:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Defendant-Appellee herein gives Notice of his intention to distinguish, during oral argument, the supplemental cases cited by Plaintiff-Appellant.

Defendant-Appellee submits that the cases listed below, which were cited in two (2) separate letters filed with the Court, are distinguishable and not on point with the instant case:

Johnson v. United States, 117 S.Ct. 1544 (1997)
United States v. Olano, 507 U.S. 725 (1993)
United States v. Frost, 1997 WL 566304

Very truly yours,
/s/Gretchen A. Holderman